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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 404

MEXICAN LIGHT & POWER COMPANY, LTD., *Petitioner,*

v.

THE TEXAS MEXICAN RAILWAY COMPANY, *Respondent*

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

Statement of the Case

Petitioner was the owner of certain electrical machinery shipped under a prepaid bill of lading from Sharon, Pennsylvania, to Laredo, Texas (R. 32A). The bill of lading was endorsed on its face "for export to El Oro, Estado de Mexico." Respondent was the final carrier named in the bill of lading and it is stipulated that the prepaid charges included delivery of the shipment to the international boundary line for delivery to the National Railways of Mexico (R. 38). After arrival of the cars carrying the shipment in Respondent's yards at Laredo, Respondent filled out one of its Uniform Domestic Bill of Lading forms with the name of Petitioner's

customs agent as shipper and Petitioner as consignee with destination El Oro, Mexico (R. 8A). No class or rate was shown on the purported bill of lading for the shipment and no payment was made to Respondent by Petitioner or its agent in addition to the charges which had already been paid for the movement from Sharon, Pennsylvania, to the international boundary line (R. 38). There was then existing no published or filed tariff in effect from either Sharon, Pennsylvania, or Laredo, Texas, to either El Oro, Mexico, or any other point in Mexico (R. 37). The document so filled out was delivered by Respondent to Petitioner's customs agent who thereafter completed his arrangements with the Mexican Customs Office to permit the importation of the shipment to Mexico (R. 42). Upon notice from Petitioner's agent, Respondent delivered the shipment, on the same cars upon which the shipment was made from Pennsylvania, to the National Railways of Mexico at the boundary line (R. 42). Respondent had a general arrangement with the National Railways of Mexico under which cars placed by Respondent at the international boundary line would be received by the latter (R. 45). Respondent, however, had no agreements with the Mexican lines for the division of revenue on any international shipment and received no part of the consideration paid to the Mexican lines for the carriage from the international border line to El Oro, Mexico (R. 42). Respondent likewise has no arrangement or agreement with the Mexican lines by which it might recuperate any damages it might pay for the negligence of the Mexican lines (R. 42-43). The sole compensation received by Respondent in connection with the shipment was its division ($248.70) of the through rate from Sharon, Pennsylvania, to the international border line at Laredo (R. 43). Because the bill of lading was endorsed "for export" a lower rate was applicable and paid

than would have been the case had the shipment been a domestic shipment from Sharon, Pennsylvania, to Laredo, Texas (R. 43). The record is silent as to whether the National Railways of Mexico issued any documents covering the shipment. While the shipment was in Mexico, in the possession of the Mexican lines, a derailment occurred resulting in serious damage to the machinery. Petitioner having failed to procure compensation for its damages from the Mexican lines filed suit against the Pennsylvania Railroad in Pennsylvania and against respondent in Texas seeking to hold each liable for its damages as the originating carrier. The suit against the Pennsylvania failed on the ground that the original bill of lading was not a through bill of lading to El Oro, Mexico, and thereafter this suit was tried with the result stated in Petitioner's brief.

Counter-Point One

If the document issued by Respondent be taken as a bill of lading, then no recovery may be had thereon since it was issued without valid consideration.

Under the original bill of lading Petitioner was named as consignee "c/o Fausto Trevino, Customs Agent, National Railways of Mexico" (R. 32A), and it is stipulated that this original bill of lading required Respondent to deliver the shipment to the Mexican lines at the international border line (R. 38). Thus, in moving the shipment from its yards to the international border line, Respondent did no more than it was already bound to do under the original bill of lading and received nothing more than what it was already entitled to receive under that bill of lading. Respondent took no part in the movement beyond the border and received nothing whatever out of the charges assessed for that movement.

Now, for the first time, Petitioner seeks to avoid the consequences of its stipulation that the original contract covered delivery to the boundary line by saying that it is contrary to the holding of the court in MEXICAN LIGHT & POWER COMPANY v. PENNSYLVANIA RAILROAD COMPANY, 33 F. Supp. 483 (D.C., Pa., 1940), despite the fact that the stipulation was signed more than two years after the court handed down its opinion. Though the holding in that case could not overcome a clear and unequivocal stipulation in this one the fact is that the court did not hold what Petitioner says it held. In the PENNSYLVANIA case the court had before it only the question whether the original bill of lading was a through bill from Sharon, Pa., to El Oro, Mexico, and had no occasion to pass upon the question of precisely where the carrier's obligation under that bill ceased. In the course of its opinion, the court did refer to delivery being completed at "Laredo," without saying where in Laredo, but on the same page (p. 485) referred to the rate as being "to the border." It is perfectly obvious that the court was not purporting to pass upon the question here presented.

Petitioner also asserts that Respondent could not have been the delivering carrier under the original bill of lading because Respondent, as one of its several independent defenses in the trial court, plead that the original bill of lading was a through bill of lading from Sharon, Pa., to El Oro, Mexico, so that it was an intermediate carrier. Petitioner states (Br. p. 16) that Respondent has asserted this position throughout these proceedings up until the present time. It is true that in its pleadings Respondent did raise as one of its defenses that it was neither the originating nor delivering carrier under the original bill of lading. It is not true that this defense was ever presented to any of the courts below. It was in fact abandoned after the decision in the PENNSYLVANIA case above referred to. This suit was filed within a few months after the filing

of the suit in Pennsylvania and Respondent, by raising the defense in question in its pleadings, was simply adopting the very theory then being asserted by Petitioner in the Pennsylvania suit. When that case was decided, the decision was accepted by both parties to this suit as being correct and, since that case was decided before this case was tried, Respondent never urged the defense in the trial court or at any time thereafter.

Concededly Respondent was under no obligation to issue the document which it did issue and for which it received nothing whatever. Had Respondent not gratuitously issued this document the shipment would have moved precisely as it did move and Petitioner would admittedly have had no recourse against any of the carriers other than the Mexican lines. This being so, it is difficult to understand Petitioner's argument that the decision below contravenes the public policy expressed in the Carmack Amendment. The soundness of the public policy on which the Carmack Amendment is bottomed is not, of course, challenged by Respondent, but Respondent knows of no public policy under which a shipper is entitled to have his goods insured free of charge, which is precisely what Petitioner is demanding here. Likewise, Respondent knows of no public policy that corporations doing business in Mexico be protected by American carriers against the negligence of the Mexican railroads.

The only money consideration for the issuance of Respondent's document which Petitioner purports to find is the payment made for the shipment under the original bill of lading from Pennsylvania to the boundary line (Br. p. 17). The argument, though not entirely clear, seems to be that since the payment under the original bill of lading covered delivery to the international boundary line, that payment constitutes consideration for the issuance of a purported contract to carry from Respondent's yards in Laredo to the international

line and thence to El Oro, Mexico. Petitioner says that this is so regardless of whether the movement from Respondent's yards to the international boundary line was under the original bill of lading or under the document issued by it. How the consideration received by Respondent for moving the shipment from Alice, Texas, to the international boundary line under the original contract can be metamorphosed into consideration for an entirely new and different contract to move from Respondent's yards in Laredo, Texas, to El Oro, Mexico, is not explained nor is any authority cited in support thereof. Such a contention is, we submit, directly contrary to the decision of this court in MISSOURI, KANSAS AND TEXAS RY. CO. v. WARD, 244 U.S. 383 (1917), in which it was held that a bill of lading governs the shipment from point of origin to point of destination and that the issuance of a new bill of lading by a subsequent carrier without receipt by the latter of anything more than the consideration paid for the original contract is without consideration and unenforceable. It is true that in that case the second bill of lading was to the same destination as that shown in the original bill of lading but the principle involved is the same. The original bill of lading in this case governed the shipment up to the time of delivery at the international border line by Respondent and when Respondent performed this duty, it performed everything for which it had been paid by Petitioner. Petitioner neither paid nor promised to pay more to Respondent than Respondent's division of the through rate from Pennsylvania to the border and if Respondent promised to do more than it promised to do and did under that contract then its promise is clearly and wholly without consideration.

To hold that the rate paid for the movement from Sharon to the boundary line constituted consideration for issuance of the second document would also do violence to the well settled rule that a carrier may not lawfully assume any

duty or perform any service for the rate received by it other than is pecifically authorized by its tariff and open to all shippers on equal terms. DAVIS v. CORNWALL, 264 U.S. 560 (1924). The rate paid by Petitioner covered transportation to the border and nothing more. Clearly it did not authorize Respondent to assume the obligation of insurer of the shipment during the movement in Mexico. cf. CHICAGO & ALTON R. R. Co. v. KIRBY, 225 U.S. 155 (1912); STEVENS v. ATCHISON, T. & S. F. RY. Co., 202 N.Y.S. 195, 199 (A.D., 1923).

Here, for the first time, Petitioner purports to find some technical consideration, other than monetary, moving to Respondent for the issuance of its document. It is said that by issuing this document Respondent procured the advantage of having the shipment move from its yards in Laredo to its Mexican destination under a contract containing terms and conditions desired by it. The document issued by Respondent was on the form used for Uniform Domestic Bills of Lading and its terms and conditions were precisely the same, word for word, as those contained in the original bill of lading from Sharon, Pennsylvania, to the international boundary line. Thus the issuance of this document gave Respondent nothing it did not already have so far as transportation in the United States is concerned, and so far as concerns the transportation from the boundary line to the Mexican destination, the Respondent was entirely without interest. No agency relation between Respondent and the Mexican lines is suggested and Respondent had no control, direct or indirect, over the movement within Mexico or the type of contract, express or implied, under which it moved in that country. The statement made several times in Petitioner's brief that the movement in Mexico was under the document issued by Respondent is wholly without support in the record. Respondent does not know what kind of arrangement Petitioner's customs agent made with the Mexican

lines, this being a matter peculiarly within the knowledge of Petitioner who failed to make any proof with respect thereto. Respondent can and does deny that it received any benefit whatever from having issued the document in question and Petitioner has not pointed out any such benefit.

Another alleged consideration, now brought forth for the first time, is that Petitioner's customs agent failed to get a transportation contract from the Mexican lines because of the issuance of the document by Respondent. By reason of this, says Petitioner, it was unable to collect damages from the Mexican lines which constituted a detriment to it sufficient to constitute a valid consideration for the issuance by Respondent of its document. There are at least two things wrong with this argument—there is no evidence whatever that Petitioner's agent did not get a contract from the Mexican lines covering the movement in Mexico and there is no evidence that Petitioner's failure to collect damages from the Mexican lines was due to the want of a contract. The record shows only that Petitioner filed a claim with the Mexican lines, which was rejected, but does not show the reason for the rejection nor is there anything in the record to show what might have happened if suit had been filed against the Mexican lines as suits were filed against the Pennsylvania Railroad and this Respondent.

Throughout Petitioner's argument there is an undercurrent of suggestion that the issuance of the document in question was against its wishes and to serve some undisclosed purpose of Respondent. The more natural assumption is, of course, that the document was issued at the request of Petitioner's agent since it is not common for railroads to run down shippers and force unnecessary and unwanted bills of lading on them. Nowhere is it explained how Respondent could possibly have received any benefit from the issuance of this document but Petitioner is here contending that its issuance

is beneficial to it to the extent of some $23,000. As a matter of fact the only reasonable inference from this record is that that the document was issued to Petitioner's customs agent as an accommodation to him and to enable him to expedite the clearance of the shipment through the Mexican customs. This inference, it is submitted, is a reasonable one from the stipulation (R. 42) that Petitioner's customs agent did not make his arrangements with the Mexican customs authorities for the entry of the shipment into Mexico until after he had gotten the document from Respondent. With this document he could show the authorities that the shipment was actually in the possession of the Respondent ready for immediate delivery to the Mexican lines. Without it he could show nothing more than that the shipment had been made.

The cases cited by Petitioner are not in point. RICE v. OREGON SHORT LINE R., 198 P. 161 (Idaho, 1921), involved a shipment of sheep which moved over an intrastate interurban railway from Linder, Idaho, to Caldwell, Idaho. When the shipment arrived at Caldwell the shipper paid the charges to the agent of the interurban company, signed a receipt, and surrendered the bill of lading to the agent. The shipper then tendered the shipment to the Oregon Short Line for shipment to Chicago, Illinois. The shipment was accepted and a bill of lading was issued naming the Union Pacific as one of the intermediate carriers. The sheep were injured while the shipment was being carried by the Union Pacific and the shipper brought suit against Oregon Short Line on the theory that it was the initial carrier. In defense the carrier urged that the interurban company was the initial carrier because the shipper intended, at the time he made the intrastate shipment on the interurban line, that a further shipment outside the state would be made. The court held, however, that the intent of the shipper could not make a single transaction out of

what were in law and in fact two separate and distinct transactions. In this case the interurban contracted only to carry the shipment from Linder to Caldwell which contract it performed. It received its compensation for performing the contract and took a receipt and surrender of the bill of lading from the shipper. The contract of the Oregon Short Line was an entirely new and different transaction for which the Oregon Short Line received a new and distinct consideration. Under the stipulation in the present case the original shipment had not terminated and Respondent received no consideration whatever for the issuance of its document.

LOUISVILLE & NASHVILLE RY. CO. v. JOHNSON, 206 S.W. 638 (Ky., 1918), involved a shipment of livestock from Battle Mount, Nevada, to Mt. Sterling, Kentucky, on a through bill of lading issued by the Southern Pacific. When the shipment reached East St. Louis the horses and mules were unloaded from the cars in which they were originally shipped and plaintiff surrendered the original bill of lading to the Louisville & Nashville but did not pay the freight charges then due because of lack of cash. Plaintiff had meanwhile purchased additional horses and mules in East St. Louis and these newly purchased animals were commingled with the animals from the old shipment and loaded into different cars furnished by the L. & N. The L. & N. issued its bill of lading covering the new shipment from East St. Louis to Mt. Sterling and agreed that the freight charges, both for the old shipment and the new could ride with the shipment to destination. Plaintiff later sued the L. & N. as initial carrier, for alleged damages to the animals while the shipment was in the hands of a connecting carrier. The court found that the shipper obtained no advantage by the issuance of the new contract, and that there was nothing in the circumstances to indicate that the transaction was a mere subterfuge to evade the law. It further held that the original contract had

been abandoned by mutual agreement and that the transaction under which the L. & N. issued its bill of lading was a new transaction with respect to which the L. & N. was the initial carrier. Not only was the subject matter of the second bill of lading different from the subject matter of the first but the consideration moving to the L. & N. under the second bill of lading was different from what it would have received under the original bill of lading. If the original shipment had moved through under the first bill of lading to destination the L. & N. would have received simply a division of the applicable rate on the animals involved in that shipment. Since livestock rates are based on weight, the L. & N. moving a different group of animals from that moving under the first bill of lading, received a different division of the rate based on the weight of the new shipment. The fact that the shipper was unable to pay the charges to East St. Louis under the original bill of lading and that the L. & N. permitted these charges to ride along with the shipment to destination obviously does not affect the legal questions involved. It may be added that the court called particular attention to the fact that treating the second bill of lading as a valid contract would not result in any advantage to the shipper. In the present case, however, if the document issued by Respondent be treated as a valid and binding bill of lading within the meaning of the Carmack Amendment Petitioner herein will receive thereby a rebate to the amount of any judgment recovered by it, and, by the same token an advantage over other shippers to Mexico via Laredo. Had the shipment moved through, as it would have moved, had Respondent not issued the document which it was not obliged to issue, Petitioner clearly would have had no right of recovery against Petitioner or any other domestic carrier. Likewise it would have had no just cause for complaint that it could not recover damages against these American carriers.

SOUTHERN PRODUCE COMPANY v. NORFOLK SOUTHERN R. COMPANY, 132 S.E. 360 (Va., 1926), and CHASE & COMPANY v. FLORIDA EAST COAST R. COMPANY, 115 So. 825 (Fla., 1927), have no bearing on the present case. They hold merely that where a shipper and an intermediate carrier change the destination of a through shipment without the knowledge or consent of the initial carrier there is a new contract between such intermediate carrier and the shipper so that the initial carrier on the original contract is no longer the initial carrier within the meaning of the Carmack Amendment.

It is true, as urged by Petitioner, that Respondent's stock, owned by the National Railways of Mexico, has for some twenty years been held in trust for the holders of the bonds of National Railways of Mexico. It is thus true that these bondholders have an indirect interest in the outcome of this suit. The pertinency of all this, however, is not apparent.

Counter-Point Two

Petitioner's shipment was never "received for transportation" under the document issued by Respondent within the meaning of the Carmack Amendment.

When Respondent received the shipment at Alice, Texas (R. 31) it took possession under the original bill of lading issued at Sharon, Pennsylvania. It is stipulated that this bill of lading required Respondent to make delivery of the shipment at the international boundary line. The existence of this relation between Respondent and the shipment having been clearly established in the record, it is presumed to have continued until the contrary is shown. LEWIS v. HAWKINS, 90 U.S. 119, 126 (1874). The subsequent issuance of the equivocal document by Respondent does not, it is submitted,

rebut this presumption. However, it could at most raise only an issue of fact with respect to which instrument the shipment moved under from Respondent's yards to the international border line. The trial court filed no findings of fact and in such a situation all fact issues will be presumed to have been found by it in such manner as to support its judgment. ROSENBERG V. LEVIN, 181 S.W. (2d) 832 (T.C.A., 1944, err. ref.). Accordingly the trial court must be presumed to have found as a fact that the movement from the yards to the border line was under the original bill of lading.

These presumptions are fortified by the presumption that all persons are deemed to act in accordance with law—one of the strongest of all presumptions. The charges for this shipment were prepaid at origin under a reduced rate applicable from origin to the international boundary line for export into Mexico. The domestic rate from Sharon, Pa., to Laredo, Texas, was substantially higher and if the shipment be regarded merely as one to Laredo, as Petitioner would seem to have it, then Petitioner has unlawfully received the advantage of the rate to the border line. There is no evidence of any abandonment of the original contract since charges to the boundary line had already been paid and there is no evidence that the original bill of lading was ever surrendered prior to delivery at the international border line or that any new or different compensation was paid to Respondent. If, however, the original contract be taken as having been abandoned and the document issued by Respondent be taken as a new contract another violation of law would result—a carriage of the shipment by Respondent from its yards to the international boundary line free of charge. Thus, under any hypothesis other than that Respondent continued to hold the shipment under the original bill of lading until its delivery at the border line a violation of law by the parties would result. It must be presumed, then, that the movement to the boundary line was under the original bill of lading.

If, as these presumptions require, the shipment be regarded as in the possession of Respondent under the original bill of lading then, by the issuance of the second document, the Respondent clearly did not "receive" the shipment "for transportation" under such document within the meaning of the Carmack Amendment. At best, the issuance of this document was an abortive attempt by Respondent to make a contract to receive and carry the shipment on behalf of the National Railways of Mexico. There is not the slightest evidence of an agency relation between Respondent and the Mexican lines and the mere fact that Respondent had an operating arrangement with those lines to receive physical delivery of shipments at the border line does not affect the matter. The record does not show whether the Mexican lines adopted the instrument issued by Respondent as their own or issued some new and different document covering the shipment. Whichever of these possibilities is correct, however, is immaterial since in neither event did Respondent receive or hold the shipment for transportation under the document issued by it. In this regard Respondent is in no different legal position from the defendant carrier in GEORGIA SOUTHERN & F. RAILWAY COMPANY v. TIFTON PRODUCE COMPANY, 176 S.E. 89 (Ga., 1934). In that case the carrier issued its own bill of lading covering a shipment which went in part over lines of railroad affiliated with defendant and thence by connecting carriers to destination. The defendant railroad never actually handled the shipment nor did it receive any part of the through rate. The court very properly held that the defendant was not an initial carrier within the meaning of the Carmack Amendment since it never received the "property for transportation" under the bill of lading issued by it. That Respondent here physically handled the shipment under another contract does not change the situation since,

in order to recover, Petitioner must show that Respondent received the shipment for transportation under the document issued by it and not under some other and wholly different document.

In support of its contention that the shipment was received for transportation under the document issued by Respondent petitioner cites four cases. RICE v. OREGON SHORT LINE RY. CO., *supra*, is no more in point on this issue than the first issue on which it was cited. In the RICE case the first movement, intrastate, had been completed, the charges paid, a receipt taken and the bill of lading surrendered before the shipment was ever tendered to the Oregon Short Line for interstate carriage under its bill of lading for which a new and different consideration was paid. In the present case, the original carriage to the border line had not been completed and, so far as the record shows, there was no receipt given or surrender of the bill of lading by the shipper prior to the time respondent completed its original contract by delivering the shipment at the international border line. LOUISVILLE & NASHVILLE RY. CO. v. JOHNSON, *supra*, is likewise not in point since the second bill of lading was there issued to cover a shipment of different animals in different cars and for a different consideration from that which would have been due had the original contract not been abandoned. In the present case there was no abandonment of the original contract and the shipment which moved from Respondent's yards to the international border line was precisely the same goods on the same cars as received by Respondent at Alice under the original contract. BARRETT v. NORTHERN PACIFIC RAILWAY COMPANY, 157 P. 1016 (Idaho, 1916), involved a shipment of drugs and drug store fixtures from Connelsville, Missouri, to Spokane, Washington. Defendant was the delivering carrier under the bill of lading and before the shipment reached Spokane the shipper decided to reship the

goods to Rupert, Idaho, upon their arrival. Accordingly he arranged with the defendant's agent for this shipment to be made and the agent, instead of issuing a new bill of lading, altered the old one so as to show the destination as Rupert with another carrier as the delivering carrier there. After the goods arrived at the second destination they were found to have been damaged and the shipper sued the defendant on the ground that it was the initial carrier on the movement from Spokane to Rupert, Idaho. The court held that when the shipment reached Spokane the original contract had terminated and that the act of defendant's agent in altering the old bill of lading was to make a new contract on behalf of defendant for a new carriage of the goods from Spokane to Rupert. The case does not state what rate was paid for the shipment from Spokane to Rupert, but since Rupert is several hundred miles to the south and east of Spokane it is obvious that a new consideration was paid for the new movement. As in the RICE case, supra, the original contract had been completely performed and there was an entirely new movement under a new contract for a new consideration. These elements are wholly lacking in the instant case. The case of HOUSTON E. & W. T. RY. CO. v. HOUSTON PACKING COMPANY, 221 S.W. 316 (T.C.A., 1920), is not discussed by petitioner. It holds merely that an interstate carrier issuing a bill of lading covering a shipment received from another carrier which had switched the car from the industry to the defendant carrier was the initial carrier under the Carmack Amendment rather than the switching carrier which had operated under an intrastate tariff.

Under the stipulation of the parties the transportation under the original bill of lading had not been completed at the time Respondent issued its document and, so far as the record shows, the original bill of lading as well as Respondent's document were both outstanding at the time the move-

ment was made from the yards to the boundary line. Petitioner apparently concedes that it had a legal right to compel Respondent to deliver the shipment to the Mexican lines at the boundary under the original bill of lading (Br., p. 17), and it is equally clear that Respondent could not have been compelled to move the shipment from its yards to the boundary line under the document issued by it since, as will be developed under Counter-Point Three, there was no tariff authority for the issuance of such document. It is submitted that it is unreasonable to suppose that Respondent, in making the movement from its yards to the border line, was acting pursuant to an unlawful and unenforceable purported contract rather than pursuant to an admittedly lawful and existing obligation to perform the very act in question.

Counter-Point Three

There being no tariff authority for the issuance by Respondent of a through bill of lading from Laredo, Texas, to El Oro, Mexico, the issuance of such a bill of lading by Respondent would be unlawful and void under Section 6 of the Interstate Commerce Act.

Sec. 6(1)* of the Interstate Commerce Act requires all carriers subject to it to file and publish "all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through rate and joint rate have been established." Sec. 6(7)* of the Act forbids any carrier to engage or participate in the transportation of any property unless the rates, fares and charges upon which they are transported by the carrier have first been filed and published in

* Copied in full as an Appendix to this brief.

accordance with the requirements of Sec. 6(1). It is stipulated that Respondent has not at any time filed or published a through rate from Laredo, Texas, to El Oro, Mexico (R. 37). Thus, if the document issued by Respondent be taken to be a through bill of lading from Laredo, Texas, to El Oro, Mexico, rather than a mere receipt, its issuance was in direct violation of Sec. 6(7) unless, as Petitioner seems to contend, the Act does not apply to through shipments from points in the United States to points in adjacent foreign countries.

Petitioner's contention is apparently bottomed upon the settled rule that the Interstate Commerce Commission has no jurisdiction over rates in foreign countries. It does not follow, however, that the Interstate Commerce Commission has no jurisdiction over the participation by domestic carriers in joint through rates to and from such foreign countries or that a domestic carrier may join in such joint through rates without complying with the requirements of Sec. 6 of the Act. Nearly fifty years ago the Commission held that the requirements of Sec. 6 of the Act applied to export shipments, EXPORT AND DOMESTIC RATES, 8 I.C.C. 214, 272, (1899); RE TARIFFS ON EXPORT AND IMPORT TRAFFIC, 10 I.C.C. 55 (1904), and the Commission's views on the matter have been expressly approved by this Court. ARMOUR PACKING CO. v. U. S., 209 U.S. 56, 79 (1908). The Commission has also for many years had special requirements for the publication of through rates from points in the United States to points in Mexico and Canada (CODE OF FEDERAL REGULATIONS OF THE U. S. A., Title 49, Sec. 145.72), and in 1928 held a general investigation with reference thereto. PUBLICATION OF RATES ON TRAFFIC BETWEEN UNITED STATES AND CANADA, 147 I.C.C. 778, cf. LOUIS-SIMAS-JONES COMPANY v. SOUTHERN PACIFIC COMPANY, 283 U.S. 654, 660 (1931). Not only do the requirements of Sec. 6 of the Act apply to export shipments but the courts have specifically held that where no

through rate has been published it is unlawful, under Sec. 6 (7) of the Act, for a carrier to contract for through transportation to a point in a foreign country and no action will lie for breach of such a contract. J. H. HAMBLEN & SONS COMPANY v. ILLINOIS CENTRAL RAILROAD COMPANY, 212 Fed. 324 (D.C., Ark., 1914); STEVENS v. ATCHISON, TOPEKA & SANTA FE RY. COMPANY, 202 N.Y.S. 195 (A.D., 1923).

While it is true that the Commission has no jurisdiction to require the establishment of joint through rates from points in the United States to points in adjacent foreign countries, it is equally true that where such joint through rates are voluntarily established the Commission may inquire into the reasonableness thereof. NORTHWESTERN OIL COMPANY v. ST. L.-S. F. RY. COMPANY, 112 I.C.C. 488 (1926), although the Commission may not prescribe reasonable through rates for the future but can only require the domestic railroad to cease participating in the rate. TENNESSEE EXTRACT CORPORATION v. L. & N. R. R. Co., 128 I.C.C. 709 (1927).

As stated by this Court in SOUTHERN RAILWAY COMPANY v. REID, 222 U.S. 424, 442 (1912), the purpose of Section 6 of the Act was to make certain that all might know what a carrier's rates were for every service performed by it, thus enabling shippers to determine, among other things, whether they were being discriminated against and also to permit the Commission, if it were so advised, to inquire into the reasonableness of such rates. These reasons apply with equal force whether the rates be between points in the United States or between points in the United States and points in foreign countries.

Counter-Point Four

The purported contract being in violation of Sec.

6(7) of the Interstate Commerce Act to permit this action to be maintained on it would result in an unlawful rebate to Petitioner and an unlawful discrimination in its favor.

Petitioner's final contention is that even though the issuance of the document by Respondent was unlawful it may nevertheless recover thereon citing JUDGE v. NORTHERN PACIFIC RAILWAY COMPANY, 189 F. 1014 (C.C., Ore., 1911), and ADAMS EXPRESS COMPANY v. DARDEN, 286 F. 61 (C. C. A., 6th, 1923).* In both of the cases cited the alleged unlawful act was the departure by the carrier from its published rates and charges and the court quite properly held that such unlawful acts did not prevent recovery. Liability was predicated on the carrier's actual possession of the property at the time of injury and did not, as here, involve an attempt to enforce vicarious liability under a contract which the carrier could not lawfully make. These cases, along with many others which might be cited, involve an entirely different violation of law from that here involved. Sec. 6(7) forbids three things: (1) participation in transportation of property without having filed and published a tariff covering such transportation, (2) departure by a carrier from its published tariffs and (3) rebating. In the cases cited the transportation itself was perfectly lawful, since tariffs covering the particular transportation involved had been lawfully filed and published. The unlawfulness asserted in those and similar cases was the alleged departure, through collateral agreements, from the rates and conditions fixed for such transportation.

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* When the **Darden** case reached this Court (265 U.S. 265) the liability was placed on the express provisions of the first Cummins Amendment (38 Stat. 1196, 1197) and the reasoning of the court below was not accepted.

In the present case, if Petitioner is correct in its contention that the document issued by Respondent was a contract for through carriage from Laredo to El Oro, then the transportation itself was unlawful. SOUTHERN RAILWAY COMPANY v. REID, *supra*, p. 441, and Petitioner is conclusively charged with knowledge of its unlawfulness. LOUISVILLE & NASHVILLE R. Co. v. MAXWELL, 237 U.S. 95, 98 (1915). There is here involved no mere departure from the lawfully filed and published tariff because there was no lawfully filed and published tariff to depart from. What Petitioner here seeks to enforce is the unlawful contract itself and not some merely collateral illegal agreement. For the court to give vitality to this instrument as a valid through contract of carriage from Laredo to El Oro would be as much to enforce a violation of law as if the courts in the JUDGE and DARDEN cases had specifically enforced the tariff departures there involved. Not only is this true but a recovery cannot be permitted herein without offending against the third clause of Sec. 6(7) of the Act forbidding rebating in any manner or by any device.

Had Respondent not issued the document in question the shipment concededly would have been moved by Respondent to the border line under the original bill of lading and there delivered by it to the Mexican lines. Had this happened Respondent and all other domestic carriers would unquestionably have met their every legal obligation to Petitioner and none of them would have had the slightest responsibility for what happened to Petitioner's property in Mexico. Petitioner concedes (Br. p. 17) that Respondent was under no obligation, legal or otherwise, to issue the document. By the same token Respondent was under no obligation to issue through bills of lading to points in Mexico to other shippers who might be using the Laredo gateway. This voluntary and gratuitous assumption of liability for Petitioner's goods while

in Mexico would amount to a rebate to Petitioner as clearly as if Respondent had handed Petitioner a check for $23,000 without Petitioner's goods having suffered any damage. The fact that such rebate might be involuntary on Respondent's part is unimportant since involuntary rebates are viewed with the same disapproval as voluntary ones. LOWDEN v. SIMONDS-SHIELDS-LONSDALE GRAIN COMPANY, 306 U.S. 516, 521 (1939).

When Respondent received the shipment at Alice, Texas, the division it received out of the joint through rate obligated it to carry the shipment to the border line and there deliver it to the National Railways of Mexico and nothing more. If, as contended by Petitioner, it voluntarily assumed a duty beyond that—that of safely delivering the shipment in El Oro, Mexico—then the gratuitous assumption of this additional duty was a rebate pure and simple. The situation is somewhat analogous to that involved in UNITED STATES v. AMERICAN SHEET & TIN PLATE COMPANY, 301 U.S. 402 (1937), where this Court upheld an order of the Commission holding that where carriers assumed the duty of doing intra-plant switching in large industries without receiving anything in addition to the line haul rate the performance of these services beyond what was required by the contract of carriage amounted to a rebate within the meaning of Sec. 6(7) of the Act.

Not only would the enforcement of this instrument as a valid bill of lading result in a rebate to petitioner, but it would also result in an unlawful discrimination in favor of petitioner in violation of the Elkins Act. U. S. CODE, Title 49, Sec. 41. Petitioner concedes that neither it nor any other shipper has the right to demand that Respondent issue through bills to Mexican points on shipments from the United States and to accord such a privilege to petitioner constitutes a plain discrimination which cannot be justified by any of the facts

in this record. CHICAGO & ALTON R. R. Co. v. KIRBY, 225 U.S. 155 (1912), is closely in point. In that case the carrier agreed to make connections for plaintiff's shipment of horses with a fast special train. This it failed to do and plaintiff, by reason thereof, suffered damages for which he sued.* This Court denied recovery, holding that the contract violated the Elkins Act in that it attempted to give plaintiff an advantage not extended to all others by agreeing to give him a special expedited service, and to furnish him with a remedy for delay not due to negligence. In the present case, if the purported contract be given effect, Petitioner will receive a remedy for the damage to its property, not caused by Respondent, which remedy is not available to other shippers. Without proper tariff authority it is as unlawful for a carrier to guarantee that goods will be delivered safely as it is to guarantee that they will be delivered swiftly.

In urging this point Respondent is not to be taken as admitting that it violated or intended to violate any law by issuing the document it did. It has always insisted, and still insists, that the document was issued in the nature of a receipt and for the purpose of enabling Petitioner's customs agent to expedite the movement of the shipment through the Mexican customs. The argument here made is only in rebuttal of Petitioner's contention that the instrument constituted a valid through bill of lading within the meaning of the Carmack Amendment.

Conclusion

To hold Respondent vicariously liable for the acts of the National Railways of Mexico in the circumstances of this

* It is to be noted that in the **Kirby** case Respondent sought to justify enforcement of the unlawful contract on the same grounds as urged by Petitioner in the present case. 225 U.S. 161.

case would, we submit, be a rank injustice. When Respondent delivered the shipment to the National Railways of Mexico it did everything it had been paid to do and Petitioner received everything which it had paid for. Its claimed right of recovery is based solely on a document, of equivocal nature, issued only as an accommodation to Petitioner, for which it paid nothing and on which, we submit, it should recover nothing.

The judgment below was right and should be affirmed.

Respectfully submitted,

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Appendix

Part I, Interstate Commerce Act

* * *

Sec. 6. (1) That every common carrier subject to the provisions of this part shall file with the Commission created by this part and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this part.

* * *

(7) No carrier, unless otherwise provided by this part, shall engage or participate in the transportation of passengers or property, as defined in this part, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this part; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs.

SUPREME COURT OF THE UNITED STATES

No. 404.—October Term, 1946.

Mexican Light & Power Company, Ltd., Petitioner, *v.* The Texas-Mexican Railway Company.	On Writ of Certiorari to the Supreme Court of the State of Texas.

[June 16, 1947.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This is an action to recover damages for injury to goods in the course of an export shipment by rail. The Westinghouse Electric and Manufacturing Company delivered to the Pennsylvania Railroad Company in Sharon, Pennsylvania, goods ultimately destined for the Mexican Light and Power Company. According to the bill of lading issued by the Pennsylvania Railroad the goods were consigned to

> The Mexican Light & Power Co. Ltd.,
> c/o Fausto Trevino, Customs Agent,
> (National Railways of Mexico).

The destination was Laredo, Texas, with the further notation

> "For Export to: El Oro, Mexico, Estado de Mexico via Acambaro via Laredo."

The transportation charges were prepaid at the export rate, less than the domestic, and they covered shipment not merely into Laredo but up to the international boundary.

The Texas-Mexican Railway was the last of the series of connecting carriers over which the machinery was routed by the Pennsylvania. The latter, having received the shipment at Alice, Texas, continued the carriage to

its yards at Laredo. At Laredo, there was issued to Fausto Trevino, the agent, what formally appears to be a bill of lading consigning the shipment to petitioner at El Oro. The record is silent as to the circumstances that brought this document into existence, but it is admitted that the respondent received no payment for transporting the goods other than its share in the export rate prepaid to the Pennsylvania under the Sharon bill of lading. Trevino did use the second bill of lading for clearing the shipment with the Mexican customs, but there is no showing that the first bill of lading would not have served as documentation for this purpose. The respondent railroad then moved the goods, still in the original cars, from its yards to the international boundary. There, the shipment passed to the National Railways of Mexico and it was on its lines, in Mexico, that the machinery was injured.

Petitioner brought this suit in one of the district courts of Texas. Judgment went for the railroad. The Texas Court of Civil Appeals reversed, 190 S. W. 2d 838, but was in turn reversed by the Supreme Court of Texas. 193 S. W. 2d 964. We granted certiorari, 329 U. S. 697, because important issues affecting the carrier's liability under the Interstate Commerce Act were pressed upon us.

On full consideration of the case it falls within a very narrow compass. The goods consigned to Laredo moved on the bill of lading issued at Sharon with the indicated connections, including the Texas-Mexican. By virtue of the Carmack Amendment, 34 Stat. 584, amended, 38 Stat. 1196, that bill of lading determines the rights of the consignee. While each connecting carrier is, of course, liable for damage occurring on its line, only the initial carrier is liable for damage on any of the connections. Unless, therefore, the Texas-Mexican Railway was an initial carrier with reference to the Mexican Railroad it cannot be responsible for injuries on that road. And it did not be-

come an initial carrier merely by force of what purported to be a bill of lading issued at Laredo unless the so-called second bill of lading represents the initiation of a new shipment on the Texas-Mexican.

We agree with the Texas Supreme Court that nothing happened at Laredo to displace the duty which was created at Sharon for the carriage of the goods by the Texas-Mexican to the international boundary, or to modify the terms of its undertaking when, at Alice, it received the goods under the Sharon bill of lading.

What was said of the shipment of cattle in *Missouri, Kansas & Texas R. Co.* v. *Ward*, 244 U. S. 383, 387, is precisely applicable to the shipment of machinery in this case:

> "The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

No matter what the convenience which a consignee may derive from a bill of lading issued by a connecting carrier on a through shipment, unless the connecting carrier has received a consideration for the bill of lading in addition to that which flowed under the bill of lading issued by the initiating carrier, the Carmack Amendment makes such second bill of lading void. It can neither enlarge the liability of the connecting carrier nor contract that of the initiating carrier. That is what was meant when the *Ward* case said that the purpose of the Carmack Amendment was "to create in the initial carrier unity of responsibility for the transportation to destination." *Missouri, Kansas & Texas R. Co.* v. *Ward, supra*, at 386. This is an even stronger case for the application of this principle. For in the *Ward* case the Court found the second bill of

lading void for lack of consideration although it was "alleged to have been issued in consideration of a special reduced rate theretofore filed with the Interstate Commerce Commission" because there was "nothing to indicate that that special rate affected the through rate already agreed upon in the original bill of lading." 244 U. S. at 385–86.

Properly finding that the so-called bill of lading did not evidence any new and independent undertaking, when judged by the rigid requirements by which bills of lading are valid under the Carmack Amendment, the Texas Supreme Court was right in holding that the shipment over the Texas-Mexican legally moved only under the original bill of lading, that the Pennsylvania was never displaced as the initial carrier, and that therefore the Texas-Mexican was not liable for damage that occurred on the Mexican Railroad.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES

No. 404.—October Term, 1946.

Mexican Light & Power Company, Ltd., Petitioner, v. The Texas Mexican Railway Company.	On Writ of Certiorari to the Supreme Court of the State of Texas.

[June 16, 1947.]

Mr. Justice Reed, with whom Mr. Chief Justice Vinson joins, dissenting.

We are of the opinion that the respondent, The Texas Mexican Railway Company, is the initial carrier under the bill of lading issued by it at Laredo for carriage of the articles to El Oro, Mexico. The bill of lading issued by the Pennsylvania Railroad was for carriage from Sharon, Pennsylvania, to Laredo, Texas. Accepting the interpretation of the Court, that this Pennsylvania bill required the delivery of the shipment by the respondent at the International Boundary in Laredo, there remains the necessity of causing the shipment to cross the boundary line and proceed upon its journey into Mexico. As the Court concedes, the bill of lading, sued upon here, was used to clear "the shipment with the Mexican customs." It is also plain that it was this latter bill that caused the shipment to cross the line. Without it, the respondent could not have made delivery to the Mexican railway system. The Pennsylvania bill of lading called for delivery to the consignee's agent in Laredo, Fausto Trevino. The consideration to respondent for its issue would be a similar service for northbound shipments from the Mexican Railways or promotion of respondent's export business.

The *Ward* case, 244 U. S. 383, is not an authority for the Court's holding. There the suit was brought on a through bill from a Texas point to an Oklahoma point. The defense was that a new contract had been made with a connecting carrier. It was said, p. 387:

"The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

The facts of this case seem to us entirely different and to require that the respondent railway accept responsibility as the initial carrier.